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IN THE

Supreme Court of the United States

October Term, 1964

No. 617

WALTER R. HEARNE AND STANLEY E. WHITMAN,

Appellants,

vs.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho.

Appellees.

On appeal from the United States District Court for Idaho, Southern Division

MOTION TO DISMISS OR AFFIRM

ALLAN G. SHEPARD
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Counsel for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON.

227 State House
Boise, Idaho

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Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees, Arnold Williams, Allan G. Shepard, Joe R. Williams and Marjorie R. Moon, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal herein be dismissed on the ground hereinafter set forth, or, in the alternative, that the stay order of the court below be affirmed, on the grounds hereinafter set forth.

ARGUMENT

I.

APPELLANTS' APPEAL SHOULD BE DISMISSED

Appellants have pursued their appeal under 28 U.S.C. (1958). Attached as Appendix A on pages 1 (a) to 3 (a) of their jurisdictional brief, is the July 28, 1964 order of the three-judge statutory court staying the proceedings in the instant matter:

> "IT IS ORDERED That decision on all pending motions is reserved and all further proceedings in this action are hereby stayed, until the expiration of the period of thirty (30) days next following adjournment of the next regular session of the Legislature of the State of Idaho in January of 1965, *or until further order of Court.*" (Emphasis added.)

These appellees believe appellants' present appeal should be dismissed because they have not shown that the stay order falls within the specific appeal requirements of 1253 of being an order, "granting or denying . . . an interlocutory or permanent injunction." Appellees admit that the appealability of stay orders in Federal Courts is an area of appellate procedure which is in a state or flux. The subject is discussed in the May 1963 edition of 47 *Minnesota Law Review*, beginning on page 1099. Since the lower court's action is claimed by appellants to have dealt them "irreparable injury" (Appellants' Jurisdictional Brief, page 18). it is apparent that appellants have recognized the difficulty of appealing a stay order, and that only in circumstances where the court's stay order in effect constitutes "serious and irreparable" injury to a party does it then fall within the allowed realm of 28 U.S.C. $ 1253.

Appellants on page 2 of their jurisdictional brief claim that the three-judge court refused to make a decision on the pending motions. They repeatedly assert that the lower court's grant of a stay order was improper when there was no motion or request before that court to do so. (Plaintiff's Jurisdictional Brief, pages 5-6, 7, 12, 18, and 20.) Appellees cannot comprehend appellants' argument because it is well recognized that a judicial body may issue a stay order on its own motion. Appellants also contend that at the hearing on July 24, 1964, there was an absence of any evidence indicating grounds for the stay. Counsel for these appellees did submit oral argument to the court in support of a stay and that the court did direct discussion to counsel on the topic.

Appellees believed there was a request already before the court to consider staying the proceedings. Appellants note on page 11 of their Jurisdictional Brief that the defendant, Robert E. Smylie, Governor of the State of Idaho, filed a motion on July 2, 1964. In that motion that defendant prayed that the court conduct a hearing in order that compliance might be had in the case at bar with the opinion of this Court in Reynolds v. Sims 377 U. S. 533, 84 S. C. 1362 (1964). 12 L. Ed 2d 506 (1964). In addition, in the order of July 20, 1964, the Clerk of the Federal District Court notified all counsel that the case, "had been set for further proceedings in conformity with the Opinion and Judgment of the Supreme Court of the United States, including hearings on the Petition of the defendant, Robert E. Smylie, Governor

of the State of Idaho * * *", and that such would be considered on July 24, 1964.

On pages 1393-94 of 84 S. Ct. the majority of this Court in *Reynolds v. Sims* said:

> "We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. Remedial technique in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such a where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely, upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by Mr. Justice Douglas, in concurring in Baker v. Carr, 'any relief accorded can be fashioned in the light of well-known principles of equity.'"

"We feel that the District Court in this case acted in a most proper and commendable manner. It in-

itially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. *And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination*, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an *adequate opportunity to do so.*" (Emphasis added.)

This Court in its *per curiam* opinion of July 22, 1964, in reversing the lower court's decision in the instant matter specifically remanded the case;

> "for further proceedings consistent with the views stated in our opinion in Reynolds v. Sims and in other cases relating to state legislative apportionment decided along with Reynolds."

In light of the above closing remarks of this Court in *Reynolds v. Sims* and understanding defendant Robert E. Smylie's request for the lower court to conduct further proceedings consistent with the views stated in *Reynolds v. Sims*, these appellees were of the opinion that the lower court would assuredly consider any arguments directed towards a stay of the proceedings which were mentioned so vividly in *Reynolds v. Sims.*

These appellees believe the Supreme Court of the United States should dismiss the appeal of the stay order.

II.

THE STAY ORDER OF THE LOWER COURT SHOULD BE AFFIRMED

It is manifest that the questions on which the decision of this case depends are so unsubstantial as to not to need further argument. The stay order of the lower court specifically adopted the exact language of the majority in *Reynolds v. Sims*, in stating that, "an impending election is imminent and * * * [the] States' election machinery is already in progress." Appellees have quoted extensively from the concluding remarks of the majority in *Reynolds v. Sims*. At the risk of repetition, appellees wish to bring to the attention of this Court that, on page 1394 of 84 S. Ct. the majority commended the decision of the district court in Alabama to stay the impending primary election and the action in refraining from acting further until the Alabama legislature first had been given the opportunity of remedying the state's legislative apportionment discrepancies. Continuing on the same page this Court enunciated:

> ". . . it is correctly recognized that legislative reapportionment is primarly a matter for legislative consideration and determination and that judicial relief becomes appropriate only when a legislature fails to apportion according to Federal constitutional requisites in a timely fashion, after having had an *adequate* opportunity to do so." (Emphasis added.)

The five additional legislative apportionment decisions which were handed down by this Court on June 15, 1964, were remanded for further proceedings consistent with the views stated in the opinion of *Reynolds*

v. Sims. The Delaware reapportionment suit of *Roman v. Sinock*, 377 U. S. 695, 12 L. Ed. 620, 84 S. Ct. 1462 commended on page 1470 of 84 S. Ct. the lower court's action:

> "In giving the Delaware Legislature an opportunity to adopt a constitutionally valid plan of legislative apportionment, and in deferring decision until after the November, 1962, general election, because of the imminence of that election, and the disruptive effect which a decision might have had, the District Court acted in a wise and temperate manner."

Apparently the lower tribunal in the instant matter of *Hearne v. Smylie* had faith in the ability and integrity of the Idaho legislature to meet the vexing problem of legislative reapportionment. Examination of the history of the Idaho legislature reveals that the lower court's faith is not ill-founded. The Idaho legislature has periodically reapportioned itself, doing so in 1917, 1933, 1941, 1951. Subsequent to the commencement of this litigation, the Idaho legislature in 1963 reapportioned the House of Representatives on the basis of the 1960 Census. As noted, by the lower court (225 F. Sup. at pages 615-52) the legislative action followed a decision of the Idaho Supreme Court in the reapportionment suit of *Ceasar v. Williams*, 84 Idaho 254, 271 P. 2d 241 (1962). This conduct of the Idaho legislature vividly demonstrates that appellants' repeated accusations in their Jurisdictional Brief belittling the integrity of the Idaho lawmakers is without foundation. House Bill No. 50, which reapportioned the House of Representatives in 1963, thereby giving counties with larger populations additional representation, was pass-

ed by the House with 57 ayes, 2 nays and 4 excused. The bill passed the Senate with 39 ayes, 2 nays and 3 excused. This overwhelming vote displays a great wealth of bipartisanship that tarnishes, if not totally destroys, any such contention of appellants.

Furthermore, the special session of the Idaho legislature which met in August of this year, enacted House Bill No. 4:

> "SECTION 1. There is hereby appropriated from the General Fund of the State of Idaho to the Legislative Council the sum of $20,000.00, or so much thereof as may be necessary, for the purpose of conducting a study of the problem of reapportioning the Idaho Legislature. The Council shall complete the study and make report thereon to the membership of the Legislature at the earliest possible date.
>
> SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be effective from and after its approval."

The Legislative Council has hired additional employees and has been, and is, presently, actively engaged in complying with the directive of the Legislature.

Appellants contend that the lower court's order suspends their constitutional rights until some "fortuitous" time in the future (Appellants' Jurisdictional Brief page 18). On the same page they state "an indefinite delay is allowed without any evidence or motion on part of any of the defendants asking or supporting the same." Then, in the same breath, appellants propose the preposterous contention that the stay

order of the lower court could be applied by the legislature in such a manner that this legislative body would never adjourn. Appellants submit that this legislature body for which counsel for appellants is the house minority floor leader, is of better material than appellants disrespectfully suggest.

The final phrase of the lower court's stay order was that the proceedings would be stayed "until further order of the Court." If the Idaho legislature at any stage abdicates its political responsibility surely the lower court has power to step in and rectify the situation. For appellants to suggest that Federal District Court in the instant matter would allow the proceedings to continue in the manner suggested by appellants attacks the honesty and competence of that court.

CONCLUSION

This Court, on November 16, 1964, in *Scranton v. Drew*, Opinion No. 201, vacated the lower court's judgment which had held invalid the Pennsylvania constitution and statutory apportionment provisions. This Court referred to the September 29, 1964, decision of the Supreme Court of Pennsylvania, *Butcher v. Bloom* Pa. , 203 A.2d 556, wherein the Pennsylvania Court stated:

> "We have indicated that it is our expectation that the Legislature will proceed in timely fashion to enact reapportionment laws which conform to constitutional requirements. We must recognize, however, that if the General Assembly fails to act in a timely fashion, we shall be obliged to take necessary affirmative action to insure that the 1966 election of Penn-

sylvania legislators will be conducted pursuant to a constitutionally valid plan. Proper regard for our responsibility compels us to retain jurisdiction of this matter pending legislative action.

Should the Legislature fail to enact a constitutionally valid plan of reapportionment as soon as practical, but not later than September 1, 1965, we shall take such action as may be appropriate in light of then then existing situation.

Jurisdiction retained in accordance with this opinion."

Appellees submit that the circumstances of *Butcher v. Bloom* are analogous to those existing in the instant matter. Thus, these appellees request the Supreme Court of the United States to dismiss appellants' appeal or in the alternative to affirm the order of the lower court staying these proceedings.

Respectfully submitted

ALLAN G. SHEPARD,
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State of Idaho

M. ALLYN DINGEL, JR.,
Assistant Attorney General
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Counsel for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON.

PROOF OF SERVICE

I, Allan G. Shepard, Attorney General of the State of Idaho, and one of the Attorneys for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON *herein*, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of November, 1964, I served copies of the foregoing Motion to Dismiss or Affirm on the several parties thereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

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